IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 574 of 1993

with

CRIMINAL APPEAL No 763 of 1993

with

CRIMINAL APPEAL NO. 646 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

LALUBHA KESHRISINH GARASIA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 574 of 1993
MR AR THAKKAR, Advocate appointed for appellant
MR.S.R. DIVETIA, ADDL. P.P. for Respondent

2. Criminal Appeal No 763 of 1993
MR. S.R. DIVETIA, ADDL.P.P. for appellant.
MR HD VASAVADA, Advocate, for Respondents

3. Criminal Appeal No. 646 of 1993

MR. A.R. THAKKAR, Advocate appointed for the appellant

MR. S.R. DIVETIA, ADDL.P.P. for the respondent

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

Date of decision: 06/02/97

ORAL JUDGEMENT (per N.J. Pandya, J)

All the three appeals arise out of a judgement given in Special Case No. 29 of 1991 of the court of learned Sessions Judge, Surendranagar which came to be tried by him as a Special Judge in his charge as The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was involved. The main charge, no doubt, was under Section 302 of I.P.C. read with Section 34 as also under Section 307 read with Section 34 of the I.P.C.

2. The incident happened on 29.4.1991 at about 11.30 a.m. in Malar chowk area of Surendranagar town. The prosecution witnesses and the victim of the crime all belonged to Harijan community and the accused are either Muli or Rajputs. They are armed with weapons like Dharia, stick, sword etc and at the aforesaid place and time they assaulted the prosecution witnesses. One of whom died and another received serious injuries. The surviving injured witnesses are Jerambhai Valabhai and Jethabhai Valabhai. The person lost life is Khushal Manji. Complaint came to be given by one of the injured witnesses Jethabhai Valabhai. The reason for the incident is said to be what transpired on previous evening while the accused party was singing devotional songs. There seems to be a complaint filed in this regard and the other side i.e. the prosecution side were also on way to file a complaint with regard to their grievances. In all 8 such accused were facing trial and at the end of it, the learned Judge convicted only accused No. 1 and 5 for offence under Section 307 read with Section 34 of the I.P.C. and under Section 3(2)(v) of the said Atrocities Act.

3. For the offence under Section 307 read with Section 34 of I.P.C. both the accused came to be awarded sentence of five years rigorous imprisonment and fine of Rs. 1000/- and in default to undergo three months simple imprisonment, while for the offence under the Atrocities Act, they were awarded rigorous imprisonment for seven years and fine of Rs. 1000/- and in default simple imprisonment for three months in respect of each of the

accused.

4. The convicted-accused have filed appeals No. 574 of 1993 and 646 of 1993. They are respectively original accused Nos. 1 and 5. Appeal No. 763 of 1993 is filed by the State against the order of acquittal passed by the learned Judge in respect of the remaining offences, the principal being under Section 302 of the I.P.C.

5. Before proceeding with the appeals of the accused-appellant we concentrate on the appeal filed by the State. If at all they were held guilty under Section 302 of the I.P.C. obviously the complexion of their appeals against the original conviction order will radically change. However, looking to the post-mortem note prepared by Dr. Parikh, P.W. 8, page No. 651 and the postmortem note Exh. 37 at page 663 the death is on account of breaking of 8th rib left. This broken bone had apparently caused damage to spleen as well as liver. This led to internal bleeding and the man died.

6. However, with regard to the evidence of the prosecution witnesses, though there are eye witnesses, no specific role is assigned to any of the accused, acquitted or convicted which would lead us to hold that the vital injury was caused by any of them. Unless this fact is established, there is no question of taking aid of Section 34, namely that of common intention.

7. The external injury given in column No. 17 at serial No. 10 in abdominal region is a stitched wound of 3 cm. This is the position to be found from the P.M. Note Exh. 37, page 663. For further details injury certificate of deceased Khushal Manji produced by Dr. Parmar PW 5, Exh. 24, will have to be seen. This deposition at page 589 read with certificate Exh. 25, page 601 onwards makes it clear that the said abdominal injury was an incised wound of the dimension of 1 cm x 1/3rd cm x 1/3rd cm. By its side there was abrasion of 8 cm x 1 mm. This would mean that whatever the weapon, no doubt sharp weapon, because the wound is incise it penetrated only upto 1/3 cm which would be 3 to 4 mm. This wound could not lead to injury of either the spleen or the liver. As stated earlier, this has been caused mainly because the 8th rib was broken. How it came to be broken could not be established definitely. It might have been the result of a blow given with force using hard and blunt weapons like stick which one of the accused was said to be carrying.

8. In absence of any definite evidence about the

blow having been given resulting into death of any of the accused, in our opinion, the view taken by the learned trial judge acquitting the accused of charge of murder cannot be said to be unwarranted or unjustified. We therefore disallow the State appeal.

9. So far as the charge under Section 307 is concerned it relates directly to the injury caused in respect of those two injured witnesses Jethabhai Valabhai and Jairambai Valabhai. Injury caused to Jethabhai as established from the evidence of Dr. M.R. Parmar, PW 5, Exh. 24 at page No. 587 is clearly of a serious nature and could have resulted into death. The conviction under Section 307 of I.P.C. in our opinion cannot be disturbed. There is no reason to disbelieve the eye witnesses' testimony given by not only the injured witness but by other witnesses also.

10. If the incident relating to Jethabhai Valabhai and his brother Jairambhai Valabhai is examined in the background of the earlier charge of murder under Section 302 it is clear that Khushal Manji died after the incident was over and he had virtually left the place in the midst of the incident. As against that, these two injured witnesses, as could be seen from the evidence itself, had actually received injuries in the incident itself and therefore the conviction under Section 307 of I.P.C. as held by the trial court, in our opinion, is well founded.

11. Conviction under Section 3(2)(v) of the Atrocities Act is altogether a different thing. Section 3(2)(v) of the Atrocities Act reads as under:-

" Sec. 3 Punishments for offences of atrocities -

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe -

(v) commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine."

12. Provisions of section quoted above clearly indicate that the offence under I.P.C. should be established by the prosecution to have been committed on the ground that the injured person or persons against

whom the offence is committed is/are a member of Scheduled Caste or Scheduled Tribe. It is not sufficient that the injured person should be a member of either but further it is required to be proved that the offence has been committed on the ground of victim being a member of Scheduled Caste or Scheduled Tribe. In absence of this material, merely because the injured happens to be Scheduled Caste or Scheduled Tribe automatically the offence under Section 3(2)(v) of the Atrocities Act is not made out. There is no material on record indicating that the deed was done on the ground that the injured was a member of Scheduled Caste. The fact that they are members of Scheduled Caste is not in dispute. However, in absence of the material that the offence has been committed on the ground of the victim being a member of Scheduled Caste, the conviction under the said provisions of the Act cannot be sustained. The appeal is therefore partly allowed to that extent.

13. The net result is that Criminal Appeal No. 763 of 1993 filed by the State is dismissed. Criminal Appeals Nos. 574 of 1993 and 646 of 1993 filed by the original accused No. 1 and 5 are partly allowed. Their conviction under Section 307 read with Section 34 of the I.P.C. is confirmed but their conviction under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is set aside.

By now their sentence given for offence under Section 307 read with Section 34 of the I.P.C. ought to be over. In case on account of parol and other leave which they might have obtained including temporary bail, if according to jail rule the period of five years as also the period in connection with the default of fine, if fine is not paid, is not over, the balance period shall be undergone by them. It is, of course, understood that if the sentence awarded for offence under Section 307 has by now been suffered by the accused, they shall be released forthwith, if not required for any other purpose.

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Date: 6.2.1997
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